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The Laws of Community: The Normative Implications of Crime, Common Interest Developments, and "Celebration"

Dana Young^{*}

We were a lawless people, but we were on pretty good terms with the Great Spirit, creator and ruler of all Hills are always more beautiful than stone buildings, you know. Living in a city is an artificial existence. Lots of people hardly ever feel real soil beneath their feet, see plants grow except in flower pots, or get far enough beyond the street light to catch the enchantment of a night sky studded with stars. When people live far from the Great Spirit's making, it's easy for them to forget his laws.

- Tatanga Mani, or Walking Buffalo¹

Though the phrase "Common Interest Development"² may be unfamiliar now, given recent statistics³ it is a term which will become increasingly more familiar and relevant to the future of society in the United States. As such, one should not only know what it means, but also understand its ramifications. Do common interest developments represent the future trend for American communities? Or are common interest developments more akin to prisons in reverse, where the privileged can afford to gate

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1. TATANGA MANI, TOUCH THE EARTH 23 (T.C. McLuhan ed., 1971).

2. In common interest developments (planned developments, condominiums, and cooperatives), property is held in common and owners are automatically members of an association whose elected board has the authority to set and enforce rules governing common and individual property and to use assessments to maintain the property. See CAL. CIV. CODE § 1351 (West Supp. 1997). While there used to be substantial variation in state laws governing common interest developments, as of 1982 many states have adopted the Uniform Common Interest Ownership Act. See EVAN MCKENZIE, PRIVATOPIA 153 (1994).

3. See *id.* at 11.

themselves in and keep out crime and diversity? In an attempt to answer these questions and others, this Note explores definitions of community, examines different forms of communal living, and probes the impact that fear of crime has had on the common interest development trend. Common interest developments, rather than serving as Edenic examples of community, may actually exacerbate problematic power relationships and promote an authority which contrives to homogenize difference in the service of safety and stability.

I. THE IMPORTANCE OF COMMUNITY

The twin problems of loss of national community values and the resulting alienation of individuals in society have recently been the subject of great attention.⁴ Because the loss of community values has cultural, criminological, political, environmental, and even constitutional implications, it is a salient topic which is broad in scope.⁵ One scholar dealing with these issues, Dennis Brion describes community as "a symptom of a process" which is politically, and therefore constitutionally, important in two main ways. First, this process is derivatively important because it is both necessary to the realization of the individualist values of classic liberalism and necessary to the attenuation of the impact of the hierarchical values that inevitably arise in political society. Second, this process is directly important, both in the value of the function that it can perform in the ongoing workings of political society and in the substantive values that it can generate, because it is a necessary element of the polity.⁶

4. See, e.g., James Howard Kunstler, *Home From Nowhere*, THE ATLANTIC MONTHLY, Sept., 1996, at 43 (discussing the erosion of civic life and misguided American zoning laws); Jill Stewart, *The Next Eden*, CALIFORNIA LAWYER, Nov., 1996, at 39; Bill R. Mattox, *Your Search for Community May Be Next Door*, USA TODAY, Dec. 19, 1996, at A15 (citing the dearth of community spirit and suggesting solutions).

5. Although this Note focuses on the cultural, political, constitutional, and criminological arenas, there are potential environmental implications as well. For instance, where present, community environmental concerns may mediate the landowner's right to develop land the way he or she pleases. When community values are not developed, private land ownership interests may go unchecked. Since common interest developments are "essentially counter-societal; that is, they are explicitly created to provide a different combination of goods and services from the community at large," they may have an "incentive" to underappreciate "public norms and values." Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 249 (1992). "Some radical ecologists have proposed . . . bio-regionalization and other measures to otherwise reduce the scale and character of economic activity. This proposal . . . presupposes one of the basic precepts of communitarianism, a community of shared values, in this case those of ecology. It would impose some limits on individual prerogatives to dump toxic waste in wilderness areas or in oceans, lakes, and rivers, or to undertake private initiatives which violate its precepts." STANLEY ARONOWITZ, *THE DEATH AND REBIRTH OF AMERICAN RADICALISM* 166 (1996).

6. See Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685, 708-09 (1992).

Community may be an antidote to hierarchical competitive values, as well as a catalyst for participation in the political process.⁷ Community may thus be crucial to democracy and central to removing systematic forces such as racial discrimination and class stratification, which are both causes of crime.

An examination of the systems or strategies which foster, restore, and rebuild community is perhaps particularly relevant at a time when we have more people incarcerated than ever before,⁸ and "we are tending to build cities that are marvelously effective mechanisms for reducing face-to-face contact to the most impersonal transactional level."⁹ The crisis in this country's communities, particularly in the inner cities, is "America's most obvious problem."¹⁰ Yet, it is a problem which has not generated much response or government attention.¹¹

II. A WORKING DEFINITION OF COMMUNITY

Any discussion of community necessarily involves an examination of land use patterns and attitudes toward real property and shared space.¹² There are lessons and analogies to be drawn from the Native American approach to tribalism and community such that the outlines of what constitutes a community or tribe can be approximated.¹³

7. It may be argued that participation in the political process is not the solution anyway. See ARONOWITZ, *supra* note 5, at 131. Aronowitz asserts that movements such as the early radical feminist movement and the civil rights movement, each of which "perfected in-your-face politics," provide potent examples of radical democratic practices. *Id.* at 136. The ACT-UP! social movement, dedicated to AIDS activism, similarly "flourishes on its refusal of conventional definitions of responsible social and political behavior whose underpinning is loyalty to the state and to the business priorities that increasingly drive its policies." *Id.* at 136.

8. In 1996 the number of inmates in prisons and jails in the United States reached 1.7 million, representing an increase of about seven percent a year since 1990. See Fox Butterfield, *Crime Keeps on Falling, but Prisons Keep On Filling*, N.Y. TIMES, Sept. 28, 1997, § 4, at 1.

9. Brion, *supra* note 6, at 740.

10. *Id.*

11. See Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES, Jan. 9, 1994, § 6 (Magazine), at 27 (examining the need for new solutions to inner-city poverty).

12. For example, examining property relationships through the perspective of "personhood," Margaret Radin notes "[c]onservatives rely on an absolute conception of property as sacred to personal autonomy" while "[c]ommunitarians believe that changing conceptions of property reflect and shape the changing nature of persons and communities." Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957-58 (1992).

13. The terms "tribalism" and "community" almost defy definition as they are contextual and often denote different things to different people. (They are used almost interchangeably in this paper as reflecting the difference between Anglo and Native American approaches to living as a group.) "Indian Tribe" is defined in Black's Law Dictionary with a certain emphasis on community: "[a] separate and distinct community or body of the aboriginal race of men found in the United States An 'Indian Tribe' within meaning of the Indian Nonintercourse Act is a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes

While one cannot effectively discuss Native Americans as a coherent group because of the wide diversity in the forms of tribal culture and organization, there may be enough commonality in some instances to make worthwhile comparisons. A tribal structure, for example, tends to value inclusion and representation. According to one scholar, "Indians realized that it was not good government to have leaders and representatives who did not have some kind of personal acquaintance with the people they led. If the leaders were remote, people felt alienated, and it was much more difficult for a community to function."¹⁴ When people are not involved in their communities, they may become unnecessary for the community's productive and political process. Consequently, they place themselves in a position for state intervention and/or criminalization.¹⁵

In the United States, the politically and economically powerful are not accountable to many whose lives they control, leaving them the ability to victimize those who are primarily powerless.¹⁶ Essentially, subordinate groups are criminalized.¹⁷ By contrast, community is valued in many Native American cultures for the effect it has on the smooth functioning of tribal governance, which in turn has a positive affect on the community.¹⁸

ill-defined, territory." BLACK'S LAW DICTIONARY 772 (6th ed. 1990) (quoting Mashpee Tribe v. New Seabury Corp. D.C. Mass., 427 F.Supp. 899, 902 (1977)). "Community" is defined in Black's Law Dictionary as "Neighborhood; vicinity; synonymous with locality . . . People who reside in a locality in more or less proximity. A society or body of people living in the same place, under the same laws and regulations, who have common rights, privileges, or interests . . . It connotes congeries of common interests arising from associations—social, business, religious, governmental, scholastic, [and] recreational." BLACK'S LAW DICTIONARY 280 (6th ed. 1990).

14. VINE DELORIA, JR. & C. LYTLE, THE NATIONS WITHIN 247 (1984).

15. According to some, the state may have an interest in controlling certain "problem population[s]." See STEVEN BOX, POWER, CRIME, AND MYSTIFICATION 207-11 (1983) (debunking the traditional criminologist perspective by questioning definitions of crime, the criminal justice system, and government penal policies). However, as poor towns cash in on the "prison boom" by creating jobs with prison building funds, the increased number of criminals has become a stimulus for a distorted form of economic growth, perhaps making them "necessary" in a certain sense. See Butterfield, *supra* note 8, at 1. Furthermore, as if in a self-perpetuating cycle, "criminologists say they are troubled by evidence that the spiraling growth of prisons is also causing unintended consequences that may actually contribute to increased crime as well as undermine families and inner-city neighborhoods." *Id.*

16. See, e.g., Brion, *supra* note 6, at 699. "[T]he momentary, shifting conception of the public good is strongly a function of the power of the economic elite to capture the policy determining organs of government." *Id.*

17. The prison statistics for African-American males are shocking. "A study of Washington, D.C. . . . found that half of black men there between the ages of 18 and 35 are under the control of the criminal justice system" Butterfield, *supra* note 8, at 1. According to one scholar, "by imprisoning such a large number of people, especially young black males, 'we have disrupted families and built up strong connections between criminal groups in prison and on the streets. All this contributes to high rates of crime in inner-city communities.'" *Id.*

18. Cf. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) This case seems to point to a problematic tribal decision process within the Santa Clara Pueblo. The Supreme Court upheld the tribal rule which classified children of male members married to female non-

For example, in Navajo culture there has been a tendency for direct representation.¹⁹ Accordingly, the United States' voting system makes them "uncomfortable, since the Navajo pattern was for discussion to be continued until unanimity was reached, or at least until those in opposition felt it was useless or impolite to express further disagreement."²⁰ According to Ronald Dworkin, people are members of a political community "only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise."²¹ The relatively homogeneous background and ascriptive ties of a tribe may also facilitate efforts to achieve consensus and common understanding. However, communities which are not based on ethnic bonds may form strong ties based on other factors such as an environmental concern for open space, a need for affordable housing, or any number of other interests or issues.²²

In addition to shared spaces, decision-making process, and interests, there are several other key components to a community. A built environment affording personal attachment or identification, shared values or beliefs, a bounded, named area, with agreements about public behavior, and established processes for reaching those agreements, are all important elements of a community.²³ A community may also include different kinds of living spaces and services in order to meet the different needs of disparate sizes and income levels of families and individuals.

Community, in the truest sense of the word, is synergistic and inclusive such that the inclusiveness feeds the synergism.²⁴ This synergism requires a climate of participation which is difficult, if not impossible, to achieve by private corporate control. The availability to single mothers or fathers of affordable day care, good schools, safe and affordable housing, and readily available health care is increasingly experienced as a private problem. However, these are truly public issues which bear on freedom and equal-

members as tribal members, but denied membership to children of female members married to male non-members. *See id.*

19. *See* DELORIA & LYTLE, *supra* note 14, at 247.

20. Kevin J. Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND. L. REV. 1273, 1284 n.49 (1991).

21. RONALD DWORKIN, *LAW'S EMPIRE* 211 (1986).

22. The common interests mentioned here are positive and tend to be inclusive. Yet, it is relevant to note that the first gated communities in the United States were actually based on exclusion of certain types or races of people in a dubious attempt to maintain property values. *See, e.g.,* MCKENZIE, *supra* note 2, at 29-55.

23. *See* Brion, *supra* note 6, at 713.

24. Kunstler describes the non-synergistically built reality of many areas: "The everyday environments of our time, the places where we live and work, are composed of dead patterns. These environments infect the patterns around them with disease and ultimately with contagious deadness, and deaden us in the process. The patterns that emerge fail to draw us in, fail to invite us to participate in the connectivity of the world." Kunstler, *supra* note 4, at 44.

ity.²⁵ While these issues were formerly of public concern, the new conservatism tends to relegate them to the ambit of private problems.

III. ALTERNATIVE APPROACHES TO COMMUNITY

There is a continuum of options for creating community: cohousing, which is a grassroots style effort based on interaction and shared space; common interest developments, with their governing homeowner associations; and finally, the corporate-controlled company town model, exemplified by "Celebration."

A. COHOUSING

Cohousing strives to combine the benefits of private housing with the advantages and ambiance of communal living. Cohousing is a form of communal living in which a family (or individual) has private separate living space and also shares communal space with cohousing neighbors. First pioneered and perfected in Denmark, cohousing has become increasingly popular in California.²⁶ Cohousing developments exist throughout northern California, including Davis, Emeryville, Berkeley, San Rafael, and Chico. There is even a consulting firm in Berkeley, The CoHousing Co., which promotes cohousing through lectures and books.²⁷ Cohousing may become increasingly popular as a viable form of affordable housing, particularly as traditional affordable housing options become scarce in many areas. In fact, cohousing is now being lauded as a cost-effective way for developers to meet city requirements for affordable housing.²⁸

Cohousing, in addition to being relatively affordable, is often able to meet the special needs of its residents. Typically designed by the people who live there, cohousing becomes particularly attractive for people who are willing to engage in the planning process and negotiate their needs and desires. For example, wheelchair-accessible paths and doorway thresholds have been added features in some cohousing projects, making cohousing an often affordable option for the physically impaired.²⁹ Additionally, cohousing features, such as child care and communal meals, can reduce the pressure felt by women and single working parents.

25. See ARONOWITZ, *supra* note 5, at 184-85. However, discrimination on the basis of class is not unconstitutional. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that Texas school financing scheme resulting in educational disparities between poor and wealthy districts did not violate the Fourteenth Amendment).

26. The first cohousing development was built in Denmark in 1972 by twenty-seven families seeking a greater feeling of community. See KATHRYN MCCAMANT & CHARLES DURRETT, *COHOUSING* 194 (1988 ed.).

27. See Claudia Morain, *Reviving the Communal Spirit*, S.F. CHRON., May 13, 1992, at Home 1.

28. See *id.*

29. See *id.*

Cohousing may also satisfy the more pervasive need for a strong sense of community. The "human potential," or community potential, of cohousing is reflected in the amenities available to those who are willing to sacrifice some of their private space. "[A] community kitchen and dining hall, a sitting room with fireplace, a laundry room, a children's playroom, . . . a crafts room, . . . an orchard, [and] a community garden" are just some of the possible communal features residents have chosen to include.³⁰ Cohousing communities are unique in the extensive common facilities they provide, and "more importantly, in that they are organized, planned and managed by the residents themselves."³¹ Perhaps one could say that cohousing functions much like a voluntary, rather than ascriptive, tribe.

Cohousing strives for community in its truest sense. There is active participation and involvement by residents throughout the life of the project. While maintaining the spirit of the cooperative movement, cohousing offers the added benefit of each household maintaining a separate dwelling.

B. COMMON INTEREST DEVELOPMENTS

Common interest developments, as mentioned earlier, are increasingly popular forms of housing, both in California and throughout the United States; "[t]he fastest-growing residential communities in the nation are private and usually gated, governed by a thicket of covenants, codes and restrictions."³² Though these developments are usually called communities, they are more of a hybrid. Although common interest developments have aspects of community, they also include problematic characteristics which seem to commodify the home.

There is often minimal resident participation in the administration of the homeowner association.³³ Despite a structure which virtually demands involvement, most common interest development homeowners either participate very little in the affairs of the association or participate only in ways that emphasize the values of individual property ownership rather than the values of community interdependence.³⁴ Indeed, "participation,

30. *Id.*

31. MCCAMANT & DURRETT, *supra* note 26, at 15.

32. Timothy Egan, *The Serene Fortress: A Special Report; Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 2, 1995, at A1.

33. One member of a common interest development expressed the typical voting situation in common interest developments; "so few people actually vote that we keep reelecting ourselves [to the board]. We can only get about 20 people to come out for annual meetings. Most people just are not interested." Karen E. Klein, *Common Ground*, L.A. TIMES, Mar. 12, 1995, at K2. See also McKenzie, *supra* note 2, at 126-32.

34. See Carol J. Silverman & Stephen E. Barton, *Common Interest Communities and The American Dream* 8 (Sept. 1987) (unpublished working paper No. 463, on file with the University of California, Berkeley).

when it occurs, is often abusive."³⁵ Though all communities may have tension and disputes, one imagines enough investment in and identification with the decision-making process that the issues are resolvable from within. In common interest developments, "many homeowners used the threat of a lawsuit as virtually their first resort."³⁶ This illustrates the tendency in common interest developments to escalate, rather than resolve, disputes.

The mix of private property with the realities of shared-space community living, though functional and effective in cohousing projects, may be disastrous in common interest developments. Common interest developments generally handle the tension between private ownership and the reality of sharing space "by drawing on their understanding of the *rights* associated with private property rather than on the norms of neighborliness."³⁷ According to some scholars, this prioritization of rights rather than community norms may stem from traditions of private property in American culture.³⁸

American private property ownership traditions "emphasize the rights of the owner to do as he or she wishes with the property, rather than the obligations of the owner to use the property in a way that is responsible to the surrounding community."³⁹ Furthermore, the home is also traditionally viewed as a private sanctuary. Thus, when the private property at issue is the home, the aforementioned tendency may be hyperbolized. There is, it seems, insufficient recognition of community relationships.

Homes are located in neighborhoods, and residents therefore are connected to each other in important ways. Shared residence means that residents share vulnerabilities to external agencies and share certain aspects of their private lives, although what is shared will vary by the individual and the neighborhood. Out of shared residence can come the recognition of interdependence. Neighborliness, as it is commonly used, recognizes this fact.⁴⁰

Perhaps a crucial distinction or differentiation between cohousing and common interest developments is inherent in the different approaches to private property. In cohousing and Native American approaches to property, the residents tend to strive for community and neighborliness with less of an emphasis on private property rights. In the common interest developments, however, the focus moves towards maintenance of property values, seemingly over certain human values. Consequently, although the

35. *Id.* at 8.

36. *Id.* at 7.

37. *Id.* at 2 (emphasis added).

38. *See id.* at 9.

39. *Id.*

40. *Id.*

encumbered nature of property ownership within the tribal scheme and co-housing seem to be generally accepted, it is often incredibly problematic in common interest developments.⁴¹

C. DISNEY'S "CELEBRATION"—AT THE EXTREME

The Disney Development Company, a subsidiary of Walt Disney Co., has created a new, somewhat controversial, housing development in Florida called "Celebration." Having modeled the area after the "American small town," the company claims it will "become an international prototype for communities."⁴² The approximately 5,000 acre "town" will have 20,000 residents, a pedestrian-oriented downtown, schools, parks, recreation facilities, and, as a more modern feature, "high-speed interactive communication with everybody else in town."⁴³ The development has stimulated a great deal of interest. More than 5,000 people entered a drawing that gave priority appointments to buy the first 351 homes and rent the first 270 apartments.⁴⁴

According to some, Celebration "satisfies the growing American hunger for a sense of community" by providing locations where residents can "come together for special events or places where people can casually meet each other during the day."⁴⁵ For others, Celebration is more akin to community's evil twin; rather than a system to develop communities, Celebration represents nothing more than a "glamorized comity," with the "absence of a bona fide purpose such as inspired most towns."⁴⁶ In the end, its ambition is "no greater than to be like a town."⁴⁷ Celebration even has a program called "Celebration Traditions." Since every town should have roots and a historical heritage, Disney has decided to manufacture, or in Disney-speak, "imagineer,"⁴⁸ their own. Celebration represents the privatization and increased corporate control of whole aspects of the American lifestyle, a bastardization of the term "community."

Much like common interest developments, Celebration functions largely by conformity and control rather than true cultural consensus and

41. See, e.g., Armand Arabian, *Condos, Cats and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1 (1995) (discussing the enforcement of Common Interest Developments' covenants, codes, and restrictions).

42. Tom Vanderbilt, *Mickey Goes to Town(s)*, THE NATION, Aug. 28, 1995, at 13. See also Michael Pollan, *Town Building Is No Mickey Mouse Operation*, N.Y. TIMES, Dec. 14, 1997, § 6 (Magazine), at 56.

43. William Vitek, *New Urbanism Building Community*, DENVER POST, Sept. 15, 1996, at E1.

44. See *id.*

45. *Id.* at 1-2.

46. Russ Rymer, *Back to the Future: Disney Reinvents the Company Town*, HARPER'S MAGAZINE, Oct. 1996, at 75-76.

47. *Id.*

48. "Imagineer" seems to mean to create something fictional, all the while pretending it is real.

community decision-making. Though Celebration will have many of the semblances of a real town, for example, "The Celebration Town Hall," "The Workplace," and "The Institute," there is no real town government.⁴⁹ The closest thing to representation in Celebration is membership in the homeowner association. However, even the actions of this homeowner association can be unilaterally overruled by the corporation.⁵⁰ The sense of community so often yearned for seems to be ironically misguided in the "pretty calm" and "civic infancy" of Celebration. The longing for a by-gone America, "is a yearning for civic maturity" in which the "messy responsibility of democracy held sway, and society worked."⁵¹ Celebration does not offer these attributes.

The more theoretically and analytically coherent communities, such as Native American tribes and cohousing projects, are built by the people within them. The tribal negotiation process takes work; it cannot be bought or canned. This emphasis on sharing, trade-offs, and sacrifice is clearly seen in cohousing projects with tasks such as the rotating responsibility of the communal meal. In a tribal approach, the emphasis on community norms and standards may restrain individual desires. By contrast, the imposed standards in common interest developments and Celebration seem to create only a comfortable, dreamy image of community, without the attendant, yet fulfilling, direct experience of true involvement and participation. In spite of what the Disney developers claim, it may still be that place really does matter, culture has importance, and communities need to evolve idiosyncratically, without corporate control.

IV. A BRIEF HISTORY OF COMMON INTEREST DEVELOPMENTS

From the 1800s to the early 1900s, common interest developments and their corresponding homeowner associations⁵² were relatively uncommon, but from the 1960s to the present their popularity has grown tremendously.⁵³ It is estimated that one out of every eight Americans now lives in some form of common interest development.⁵⁴ Current federal projections

49. See Rymer, *supra* note 46, at 69.

50. See *id.* at 75.

51. *Id.* at 76.

52. California Civil Code section 1351(a) defines "Association" as "a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development." By common usage, a homeowner association describes detached houses or townhouses with common areas—the homeowners own both the interior and exterior of their residences including the land beneath and around them; the mandatory membership association owns and manages the common property. CAL. CIV. CODE §1351(a) (West Supp. 1997).

53. See MCKENZIE, *supra* note 2, at 11.

54. See Karen E. Klein, *Living on Common Ground Bringing Both Pleasures and Perils*, L.A. TIMES, Feb. 26, 1995, at K1.

show that this number will increase to one out of every three Americans living in a common interest development by the year 2000.⁵⁵

Even from its earliest manifestations, the appeal of the common interest development was its classist and racist exclusivity.⁵⁶ The common interest development enables developers to "establish lasting patterns of housing segregation Today's [common interest developments], with their elaborate lifestyle regulations, reflect and amplify the principle adopted during decades of legalized racial segregation: restrictive covenants can be used to create homes for certain people and to exclude others."⁵⁷

The continuing impetus behind the growing popularity of common interest developments stems in large part from a new form of conservatism and a fear of crime. We are now faced with a potentially disastrous paradoxical situation in which common interest developments are a response to an unravelling social fabric, with their separatism likely encouraging the disintegration of the very values and resources needed to halt the unravelling.⁵⁸

The trend also seems to be part of a growing dissatisfaction with the inability or unwillingness of government to deal with social problems. This lack of response encourages the privatization of many traditional government services.⁵⁹ Due to the privatization of large areas of land, towns or communities may now be based instead on restricted membership, a homogenized "sameness," and increased levels of control. All of this draws into question not only what it means to form a community, but also the power of repression through the legal system.

V. COMMON INTEREST DEVELOPMENTS AS A RESPONSE

55. *See id.*

56. *See* MCKENZIE, *supra* note 2, at 34.

57. *Id.* at 58.

58. Common interest developments may actually remove much needed funds from the outlying areas. They also seem to signal that the problems are unsolvable. *See* David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995).

59. "One of the most prominent issues in economic as well as political and legal discussion today is 'privatization,' a term used generally to describe efforts to transform traditional governmental functions into privately owned and operated business." Harvey Rishkoff & Alexander Wohl, *Private Communities or Public Governments: The State Will Make the Call*, 30 VAL. U. L. REV. 509, 510 (1996). Even our judicial system, for example, is increasingly privatized with the rapid spread of professionalized Alternative Dispute Resolution. According to Stanley Aronowitz, "in the case of modern conservative administrations, this faith in privatization and voluntarism extends to the provision of pure water. While not (yet) renouncing its responsibility to provide water that is relatively free of toxins and harmful bacteria, conservatives have been so emboldened as to declare the commodification of water, if not air, a perfectly defensible position in a free (market) economy." ARONOWITZ, *supra* note 5, at 138.

TO CRIME

Public life is imbued with a barrage of information dealing with crime which fuels the clamor for law and order. Society hears about crime waves and the crime bills designed to stop them. Meanwhile, the glorification of violence in music and film gets more air play and media hype encourages fear while perpetuating the stereotypes on which society relies.⁶⁰ Public attention is diverted from the real issues which relate to the causes of crime: a consumer society with vast disparities in wealth and opportunity combined with "manufactured scarcity,"⁶¹ an ailing public education system, lack of community values, and racism. Fighting crime has taken the place of addressing the deeper social problems which this country faces.⁶² American culture's definition of justice has come to imply criminal justice more than social justice.

Thus, when an employer fails to provide healthful and safe working conditions and, as a result, workplace accidents arise; and women suffer employment discrimination or something other than aggressive physical sexual harassment on the job; African Americans are subject to hate speech; or when those affected with AIDS are victimized by the "benign" neglect of governments, the invocation of these "crimes" of negligence by activists and intellectuals is dismissed as political correctness. "Real" crime is on the police blotter and happens exclusively to individuals.⁶³

Since this law and order doctrine of crime fighting offers little hope of ever reducing the incidents of crime and seeks only to isolate those whom it affects, it is not surprising that those who can afford to have "locked themselves into gated monocultural enclaves."⁶⁴

Rather than addressing the roots of the problem, increasing numbers of

60. See STANLEY CROUCH, NOTES OF A HANGING JUDGE 53 (1990) (stating, "the media and the hysteria connected with the fear of violence would lead one to think that the city is under attack by an army of young black toughs with blood in their eyes").

61. See ARONOWITZ, *supra* note 5, at 185. For elaboration on the topic of racism, and segregated minority communities, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

62. In London, the Reverend John Papworth recently questioned the cultural definition of crime when he told parishioners (at a meeting to discuss crime) that large supermarkets are destroying community life and that it is therefore justifiable to steal from them. See *British Priest's Situation Ethics*, TIMES WIRE SERVICE, Mar. 16, 1997, at A6. He asserts that Britain's supermarket chains "have put small grocers out of business, created unemployment and encouraged greed and consumerism with their advertising campaigns." *Id.* He went on to say, "When you talk about stealing, you can only steal from a person, you can only have a moral relationship with a person, you don't have a moral relationship with things—that is a power relationship." *Id.*

63. ARONOWITZ, *supra* note 5, at 137.

64. Rymer, *supra* note 46, at 75.

people are hoping to escape to a "crime-free bubble."⁶⁵ Common interest development builders have responded by selling this aura of security. "The concern for safety has led most [homeowner] associations to employ private security guards; some have taken the additional precaution of constructing gates or even moats."⁶⁶ In fact, partially as a result of the growth in popularity of residential associations, "the total number of private security guards in the United States now exceeds the number of public police officers."⁶⁷ Consequently, these common interest developments may actually be exporting crime to the outlying communities which cannot afford the same safety.⁶⁸

Some communities take dramatic precautions, gates are only the beginning. Inside the gates, the residents may also use surveillance cameras, infrared sensors, and motion detectors.⁶⁹ "St. Andrews, a gated community in Boca Raton, Florida, spends over \$1 million a year on helicopters and canine patrols."⁷⁰ In addition to these security measures, common interest developments often seek to enforce rules about members' conduct, including such personal choices and concerns as public displays of affection, the size of allowable pets, and what types of furniture may be seen from a window.⁷¹ All of this may be done in the name of "community benefit." Consequently, yet another paradox has evolved: "the personal autonomy of some individuals entails joining other like-minded persons in homogeneous communities which must then suppress the individualism of its members to preserve the counter-societal nature of the association."⁷² Drawing on a Foucaultian image, it is the town driven by fear of plague (read fear of crime) which is "traversed throughout with hierarchy, surveillance, observation, [and] writing; the town immobilized by the functioning of an extensive power that bears in a distinct way over all individual bodies—this is the utopia of the perfectly governed city."⁷³

Common interest developments represent a trend more concerned with regulating and controlling the residents within its gates and demoralizing relatively powerless groups outside its walls than with reducing the overall amount of avoidable social deprivation. Perhaps common interest devel-

65. See Egan, *supra* note 32, at A1.

66. Kennedy, *supra* note 58, at 765.

67. *Id.* at 766.

68. Note, however, there is the possibility that even poor minority communities may have residential associations. In Los Angeles, several public housing projects have gated themselves off to defeat crime. As one resident of Mar Gardens explains, "We want the same protection as white folks." *Id.* at 767 n.34.

69. See *id.* at 766.

70. *Id.*

71. See MCKENZIE, *supra* note 2, at 15-18.

72. Brower, *supra* note 5, at 219.

73. MICHEL FOUCAULT, *DISCIPLINE & PUNISH* 198 (1995) (conducting a philosophical examination of penal institutions and the emergence of the power to punish).

opments are ironically closer to functioning like prisons rather than like the idyllic Edens they seek to emulate. The epitome of a gated community is surely a prison.

VI. HOW THE LEGAL SYSTEM DISRUPTS COMMUNITY

In yet another interesting paradox, the legal system, with its tax breaks and development incentives, seems to encourage the pseudo-communities of Celebration and common interest developments while thwarting and even ruining certain tribal or grass-roots communities. Celebration is part of a special taxing district such that Disney can use the taxes for infrastructure developments within Celebration.⁷⁴ Usually, in most municipalities, taxes are paid into a general fund to be used where they are needed, rather than specifically in the communities of origin.⁷⁵ Common interest developments often benefit from similar tax breaks or incentives⁷⁶ while other residents have had to fight for the very survival of their communities.

A. YAVAPAI

The creation of a community depends to a large degree on shared values and beliefs.⁷⁷ Unfortunately, the dominant culture has at times denied protection to the values and beliefs of certain communities. According to Wendy Espeland, there are certain beliefs attached to "institutions or forms of life, and their symbolic significance derives from social conventions and contexts that sustain their meaning;" these essential categories of beliefs have been called "constitutive incommensurables."⁷⁸ Thus, the interaction and relationships of people in a community depends to some degree on the "prerequisite" of these shared beliefs.⁷⁹ Espeland makes a distinction between the values held by the Yavapai, a western Native American tribe, and the values important to the environmental legislation of the National Environmental Policy Act (NEPA). It is NEPA standards which serve as the framework for an analysis of Yavapai culture.⁸⁰ The Environmental

74. See Vanderbilt, *supra* note 42, at 4.

75. See *id.*

76. See Kennedy, *supra* note 58, at 774.

77. These shared values and beliefs should come from the bottom up rather than from the top down as in Celebration.

78. Wendy Espeland, *Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, 28 L. & SOC'Y REV. 1149, 1166 (citing Joseph Raz).

79. See *id.*

80. In 1981, the Yavapai were faced, for the second time in their history, with the threat of being removed from their land. See Espeland, *supra* note 78. In 1875, their resettlement culminated in the Trail of Tears. See *id.* But in 1981, as they were ordered to leave their land again to make way for a dam project, the Yavapai responded by protesting in the form of a second symbolic "Trail of Tears." See *id.* Ultimately, the Yavapai and their supporters prevailed. See *id.*

Protection Agency's Environmental Impact Statement was meant to take into account the "social and environmental consequences" associated with a project.⁸¹ For the Yavapai, land is a constitutive incommensurable.⁸² Conversely, the rational choice model is all-important and binding to NEPA's bureaucratic paradigm. When the two communities clashed, "[f]or the Yavapai, the inability of the rational choice framework to accommodate ultimate or incommensurate values made it an inaccurate, even a dangerous, representation of their interests."⁸³ This breakdown in the democratic ideal of representation happens at many different levels in our legal system and throughout our culture.⁸⁴ Espeland asserts that the breakdown is pervasive. "Law, whether enacted by bureaucrats, judges, lawyers or litigants, creates categories that become imposed on and practiced in the world."⁸⁵ The consequences of these categories can and do have disruptive effects on communities and culture.

B. "POLETOWN"⁸⁶

A predominantly Polish enclave formerly situated on the outskirts of Detroit, Poletown represents yet another community imperiled by the values of the legal paradigm.⁸⁷ When the city of Detroit decided to take a substantial portion of Poletown by eminent domain and have it cleared to make way for a General Motors plant, the citizens of Poletown fought to keep their community claiming "that the city had impermissably failed to account for the loss of a cohesive community that the project would cause."⁸⁸ The citizens posited their community as a "natural resource."⁸⁹ However, the Michigan Supreme Court came to its own conclusion and expressed it "in an opinion that amounts to a bloodless discussion of the paramount legislative and executive roles in determining the public interest and the dominant weight of economic factors in measuring the public in-

81. *See id.* at 1154-55.

82. *See id.* at 1166.

83. *Id.*

84. In a more extreme example, dissident individuals may be quietly repressed by having their activities defined as criminal, thereby removing their conflict with the dominant culture from the public forum to the closed-off judicial system. As Catharine MacKinnon has said, "One genius of the system we live under is that the strategies it requires to survive it from day to day are exactly the opposite of what is required to change it." CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 16 (1987).

85. Espeland, *supra* note 78, at 1176.

86. "Poletown" was a predominantly Polish enclave in Detroit which the city took by eminent domain in order to make way for a General Motors site. The Poletown Neighborhood Council waged a vigorous resistance, but lost in the end. *See* Brion, *supra* note 6, at 704.

87. *See id.*

88. *Id.* at 703.

89. *See id.*

terest."⁹⁰ Ultimately unsuccessful, the community dispersed as residents were forced to move from homes where they had lived for many years.

People of all cultures tend to invest their environment, both natural and built, with meaning. In Poletown, "a particular church where the Poletown residents had worshipped for most of their lives became the center of a resistance campaign for the Detroit-General Motors project."⁹¹ The Poletown residents, like the Yavapai, confronted a dominant culture and system which failed to appreciate the value of their community. Community cannot be so easily transplanted as convenience may dictate; place matters, particularly when it is the result of a long history of human interaction and cultural development.

The built environment can have powerful impacts on community and culture. It can function as "a matrix that expresses our fundamental values, while it can also serve as a vehicle of value creation."⁹² According to Brion, if the built environment arises communally, the individual will experience it in a "participatory way, with an acute understanding that her function is meaning investing as well as meaning consumption."⁹³ But, if the built environment arises in a hierarchical way, the individual's experience will be detached; "Her only function is to consume an imposed meaning."⁹⁴ The consumption of an imposed meaning seems to prevail in the conception of the planned community, and it is at an apex in Walt Disney's company created "community," Celebration.

Urban renewal projects, like that which displaced Poletown residents, may be creating serious problems for the underrepresented urban poor by destroying their communities and leaving them with no effective recourse.⁹⁵ As Brion asserts, "[e]specially among the poor, the existence of a matrix of mutually shared values and mutually shared concern and support is a necessary condition, not just to psychic well-being, but to physical survival itself."⁹⁶ Thus, the urban poor may tend to rely on and need the framework of a community more than others. While those with more resources can purchase in abundance all that they need for physical survival, the poor must often depend on a network of mutual support consisting of "a nonmonetary exchange of goods and services with each individual contributing to the others whatever meager abundance and special talents he might have."⁹⁷

The "psychic and service exchanges" are perhaps even more pre-

90. *Id.* at 705.

91. *Id.* at 710.

92. *Id.* at 712.

93. *Id.* at 713.

94. *Id.*

95. *See id.*

96. *Id.* at 702.

97. *Id.*

cious than the exchange of goods as "they can mutually and synergistically reinforce" each other, thus creating a milieu, the value of which exceeds what the physical reality might suggest.⁹⁸ When this network is scattered, as it was in Poletown, it is irretrievably lost.⁹⁹ For some, the essence of community may be expressed in daily exchanges within grass roots networks created over time by individuals. Though an outsider may view these interactions as fungible or transferable, they are often invaluable to those involved. This importance is drawn from the self-investment and self-definition inherent in the process.

In his discussion of the Poletown community, Brion points out many of the same concerns that were raised by the Yavapai. To the Poletown residents, their community was a constitutive incommensurable which was not represented in the decision of urban renewal through eminent domain. "The existence of a community could not count as a relevant factor in choosing the method of correcting the eyesore, whether by physical destruction and the scattering of the residents or by physical rehabilitation and locational continuity for the residents."¹⁰⁰ To the dominant culture and its prevailing legal norms, the value of a community to its members and the value which a community gives the rest of society were of little or no relevance. Paradoxically, this indifference may be the very core of the problem. If communities are not protected and encouraged, there may be little hope of solving the problems which lead people to retreat to common interest developments and pseudo-towns like Celebration.

B. COMMON INTEREST DEVELOPMENTS (REPRISE)

Unlike community efforts represented by the Yavapi, Poletown, and cohousing projects, which may engender behavioral norms preclusive of crime, common interest developments may actually perpetuate societal problems in the form of conflicts within the gates or by appropriating resources from the outlying community. Rather than helping to create motives for legal, civic-minded behavior and norms, common interest developments consolidate power and resources for the few at the expense of the many.

VII. CONCLUSION

The desired neighborhood is typically socially and functionally integrated, encouraging interaction and involvement. Culturally debated and mediated norms dictate behavior from the bottom up rather than from the top down. In the examination of the Yavapai, Poletown, and other newer

98. *Id.*

99. *See id.*

100. *Id.*